

THE COMPTROLLER GENERAL
OF THE UNITED STATES

FILE: B-204196 DATE: June 25, 1982
MATTER OF: Massman Construction Co.

DIGEST:

1. Agency may properly allocate risk of determining exact start date for commencement of construction project to bidders so long as solicitation contains a deadline for completion of performance stated in terms of a number of days after the start date required for completion of the work.
2. Protest against inclusion of a \$50,000 per day liquidated damages clause is denied where protester fails to show that there is no possible relationship between the protested rate and losses which are in contemplation at the time the contract is entered.

Massman Construction Co. (Massman) protests two aspects of invitation for bids (IFB) No. DACW43-81-B-0060 issued by the United States Army, Corps of Engineers, St. Louis District (Army) for the First Stage Dam Contract of the Locks and Dam No. 26 (Replacement). Massman contends that the IFB is deficient: (1) for failure to set a specific commencement date on which the awardee can begin construction and (2) for inclusion of a \$50,000 per day liquidated damages clause. The Government estimate for the project was \$165,927,580.

Massman believes that these alleged deficiencies make it extremely difficult for bidders to assess the extent and scope of the risks involved. Massman argues that the unreasonable liquidated damages clause and the lack of a definite commencement date contribute to removing all normal costing procedures in preparing a bid. The only choice available to a contractor is to make its best guess and estimate as to the costs it might incur which allows no opportunity for a competitive bid and instead tends to distort cost estimates due to the inherent uncertainties.

We deny the protest.

Start Date

Massman contends that the Army is obliged to furnish all construction project bidders with a specific start date upon which they may commence work. In support of its contention, Massman argues that the start date is particularly important in this case because the work can only begin after a third-party contractor has substantially completed work on another interrelated construction project. Moreover, there is no indication as to when the preceding project will be completed. Massman reports that the other project is currently behind schedule on account of high water, unfavorable river conditions, and labor disruptions. Massman is concerned that its ability to timely complete work on its portion of the overall project is dependent upon the presence or absence of more or less cyclical risks such as the stages of the river, weather, and potential labor disputes. Clearly, advance knowledge of the exact start date would enable Massman to predict with greater accuracy the likelihood of encountering such adverse conditions. Given this knowledge, Massman contends it could include an appropriate contingency in its bid to cover the higher cost of performance in the face of adversity.

Massman cites 49 Comp. Gen. 713 (1970) as supporting its position that the Army is required to state a specific start date. We disagree. The cited case concerns an IFB which lacked a deadline for completion of performance. The agency there neglected to state the number of calendar days required for completion of the work. What Massman is objecting to here is the absence of a start date. The protested IFB specifically sets out deadlines for performance in terms of calendar days after the contractor's receipt of the notice to proceed. This is entirely different from 49 Comp. Gen. 713 and, in our view, the requirement that an IFB state a specific duration of time during which a contractor may tender performance is different from when the specific duration of time commences. So long as all bidders know that they have a specific number of days in which to complete the project, there is a common basis upon which to conduct the competition. We agree with Massman that there may well be risks involved that can substantially impact on

the ultimate amount of time required for and the cost of completion. However, we have held that it is "within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the contractor and minimum administrative burdens on the * * * [agency]." B-173534, June 22, 1972. We note that despite the alleged risks, the Army received four responsive bids below the Government estimate.

Liquidated Damages

Massman contends that the stipulated \$50,000 a day liquidated damages provision is actually a penalty and, therefore, invalid, since it is not based on probable actual damages. Specifically, Massman objects to the Army's use of a new method of assessing liquidated damages.

The Army admits that the protested rate of liquidated damages was not calculated in the traditional manner, which considers only the costs of supervising, inspecting and administering the construction contract. Instead, the protested rate considers the traditional supervision and inspection costs as well as "the difference in the ordinary and extraordinary operation and maintenance costs between the existing structure and the replacement structure, and interest during construction." Moreover, although they constituted a probable damage, the Army elected not to include either inflation costs or the costs in delays to navigation. If this new method had been used to calculate the rate of liquidated damages on the preceding construction project, the rate would have been \$12,000 per day instead of \$2,355 per day.

The Army indicates that it has reserved the use of the new method to the calculation of liquidated damages on projects of substantial size and complexity. Moreover, prior to setting a specific rate based on use of the new method to assess the true extent of damages which the Government would conceivably sustain in the event of delay in the project, the Army assesses whether the rate set would unduly restrict competition. In this case, it was decided by the Army that, because of the procurement magnitude and complexity, only large contractors with significant bonding capabilities would have been capable of bidding on the project. The Army advises that it will, in future procurements, continue the practice of

setting liquidated damages in "amounts in keeping with their size and nature so as not to unduly restrict or limit in any way the ability of smaller contractors or businesses to fairly and effectively compete for the work or reasonably separable portions of the work to be done."

Under our decisions, Massman has the burden of showing that there is no possible relationship between the protested \$50,000 per day and the losses which are in contemplation between the parties at the time the contract is entered. Kleen-Rite Corporation, B-183591, July 10, 1975, 75-2 CPD 26. In our opinion, Massman has failed to carry that burden. Specifically, Massman objects to consideration of the difference between the cost to the Government of ordinary operation and maintenance of the old facility as opposed to the lower cost to the Government of ordinary operation and maintenance of the new facility. Massman argues that the contractor should not have the burden of such damages because ordinary operation and maintenance of the facility are the Government's responsibility. We disagree. The contractor, whose delay causes the Government to incur higher costs of ordinary operation and maintenance than the Government would otherwise have incurred had the contractor timely performed, should pay the difference. The same rationale is applicable to extraordinary repair costs needed to maintain the existing facility beyond the point where timely completion of the contract would have removed it from operation. Massman also objects to the Army's consideration of interest urging that it "is too speculative to seriously be considered as a probable actual damage." The Army reports, as follows, that it used a standard financial technique of including the interest on sunk costs (costs which are irrecoverable in a given situation) as a probable damage which would be incurred by the Government:

"* * * To determine the actual cost to the Government, the current rate of interest charged to the Government for loans was used along with the costs scheduled to be sunk at the time liquidated damages would commence. These sunk costs represent a Government outlay for which there is no return. Based on the scheduled sunk costs of \$290,000,000 and an applicable interest rate of 10 1/4 percent,

the daily interest paid by the Government would be approximately \$81,000. Based on the above information, it appears that a liquidated damage rate of \$90,000 per calendar day is justified * * *. However, considering that the interest rate and sunk cost could vary somewhat from the above cited values, it was determined that the rate of \$50,000 per day would be used * * *. Thus, the liquidated damage provision of this Invitation, although conservative, bears a reasonable relationship to the losses the Government would sustain if the Contractor fails to complete the contract as scheduled."

We do not find such an inclusion of interest too speculative for consideration in the assessment of probable actual damages. Consequently, we find that all elements of the protested rate of liquidated damages represented losses which were, or should have been, in the contemplation of the parties at the time the contract is entered. We also find that Massman has failed to show the lack of a relationship between the protested rate and these elements of loss.

Accordingly, the protest is denied.

Harry R. Van Cleave
for Comptroller General
of the United States